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MEMORANDUM

TO: WATER AND NATURAL RESOURCES COMMITTEE

**FROM: A.J. OLSEN, GENERAL COUNSEL
PECOS VALLEY ARTESIAN CONSERVANCY DISTRICT**

Re: New Mexico State Engineer Administrative Hearings

I. OPENING STATEMENT

Chapter 72, Article 2 of the New Mexico Statutes Annotated grants the State Engineer the authority and power to formulate rules and regulations governing administrative hearings conducted before authorized Hearing Examiners. Inherent in the authority granted the State Engineer is the expectation that the State Engineer will assure that all parties appearing in administrative hearings before the State Engineer Hearing Examiner will be afforded due process of the law as required by Article II, Section 18 of the New Mexico Constitution. On August 30, 2013, the State Engineer promulgated certain rules and regulations restricting administrative hearings to Santa Fe, New Mexico. This requirement effectively denies non-residents of Santa Fe County ready access to the administrative hearing procedure.

II. HISTORICAL BACKGROUND

As early as 1991, the State Engineer had regulations in place governing the location of administrative hearings. More specifically, SE 66-1, Rules and Regulations Governing Drilling of Wells and Use of Groundwater in New Mexico, Article 3 Hearings, provided that "hearings shall be held in the county seat of the county in which the proposed well is located or the matter in controversy arises, unless the parties and the state engineer stipulate upon another site for the hearing." This section, although recompiled on December 31, 2001, remained in effect until it was repealed on August 30, 2013. *A copy is attached hereto and marked as Exhibit "A."*

Between 1998, and August, 2013, the State Engineer also had in place a regulation governing the location of hearings which provided that hearings and conferences would be held by the Hearing Examiner. This particular regulation was silent as to the hearing location, and it too remained in effect until repealed on August 30, 2013. *A copy is attached hereto and marked as Exhibit "B."*

On August 30, 2013, the State Engineer promulgated 19.25.2.21 NMAC which requires that all hearings "shall be held in Santa Fe, New Mexico, unless otherwise ordered by the Hearing

Examiner." *A copy is attached hereto and marked as Exhibit "C."* The promulgation of the regulation was done despite concerns expressed by citizens residing outside of the Santa Fe corridor. The regulation promulgated on August 30, 2013 now places the financial burden on individuals and participants in State Engineer Administrative Hearings of presenting their case in Santa Fe. The financial burdens not only include the costs of traveling long distances, lodging and meals; participants to the hearings must bear the added costs of being absent from their jobs, businesses and families. In addition, they must bear the added costs of legal representation and expert witnesses. Finally, and in cases where the matter involves applications filed in State Engineer District Offices outside of Santa Fe, State Engineer employees must travel from locations such as Roswell, Las Cruces and Deming to Santa Fe for the hearing. Because many participants can ill afford these types of expenses, they are in fact denied the opportunity for a hearing and due process of law.

III. PROPOSED SOLUTION

The solution to this matter is simple. NMSA 1978 Section 72-2-16, establishes the right to a State Engineer Administrative Hearing. The present statute establishes the procedure to be followed by an aggrieved party, and it sets out the procedure for the hearing. It is proposed that the following language which is take from Section 19.25.4.16 NMAC, Repealed 8-20-13, and which provides: "hearings shall be held in the county seat of the county in which the proposed application is filed or the matter in controversy arises," be included in Section 72-2-16. *A copy of the proposed amended statute is attached hereto and marked as Exhibit "D."*

IV. CLOSING

For the reasons set out above, it is respectfully submitted that the public would be better served by amending NMSA 1978 Section 72-2-16, to require that State Engineer Administrative Hearings be held in the county seat where the application is filed or the matter in controversy exists.

Thank you for your consideration.

Sincerely yours,

HENNIGHAUSEN & OLSEN, L.L.P.

A handwritten signature in black ink, appearing to read "A.J. Olsen", written over a horizontal line.

A.J. Olsen

AJO/kc

PART 4
HEARINGS (SE-66-1, ARTICLE 3)

This rule was filed as State Engineer Rule 66-1, Article 3.

SE 66-1, Rules and Regulations Governing Drilling of Wells and Appropriation and Use of Ground Water in New Mexico, Article 3 Hearings, filed with the Supreme Court Law Library, 11-1-66; filed with the State Records Center, 6-27-91 is repealed effective 8-30-2013 and replaced by 19.25.2 NMAC, Hearing Unit Procedures, effective 8-30-2013.

Prior versions: 12-31-2001

EXHIBIT “A”
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19.25.4.16 HEARING SITE: (12/31/01)

Hearings shall be held in the county seat of the county in which the proposed well is located or the matter in controversy arises, unless the parties and the state engineer stipulate upon another site for the hearing.

[SE-66-1 Article 3-9, Recomplied 12/31/01]

EXHIBIT “A”

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19.25.2.16 LOCATION OF HEARINGS: (3/31/98)

[[click here for current version](#)]

All hearings and conferences shall be held as determined by the hearing examiner. At the request of any of the parties, and upon the stipulation of the parties and with the approval of the hearing examiner, any conferences or hearings apart from the final hearing may be held telephonically.

[03-31-98; Recompiled 12/31/01]

EXHIBIT “B”

19.25.2.21 LOCATION OF HEARINGS:

All hearings shall be held in Santa Fe, New Mexico, unless otherwise ordered by the hearing examiner. Scheduling, status, and pre-hearing conferences and motions hearings shall be held in Santa Fe, New Mexico. At the discretion of the hearing examiner, any conference or hearing may be held telephonically.

[19.25.2.21 NMAC - Rp, 19 NMAC 25.2.16, 8-30-2013]

Prior versions: 03-31-1998

EXHIBIT “C”

PROPOSED AMENDMENT

72-2-16 Hearings required before appeal.

The state engineer may order that a hearing be held before he enters a decision, acts or refuses to act. If, without holding a hearing, the state engineer enters a decision, acts or refuses to act, any person aggrieved by the decision, act or refusal to act, is entitled to a hearing, if a request for a hearing is made in writing within thirty days after receipt by certified mail of notice of the decision, act or refusal to act. Hearings shall be held before the state engineer or his appointed examiner. Hearings shall be held in the county seat of the county in which the proposed application is filed or the matter in controversy arises. A record shall be made of all hearings. No appeal shall be taken to the district court until the state engineer has held a hearing and entered his decision in the hearing.

(NOTE: Highlighted Material Proposed Amendment)

EXHIBIT “D”